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No. 97-1349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANA MARIA PAINTER,
Petitioner,

vs.

GOLDEN RULE INSURANCE COMPANY
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL AND REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL AND REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In light of this Court's decision in *Rivet v. Regions Bank of Louisiana*, 66 U.S. Law Week 4132 (1998) issued after the filing of the petition for a writ of certiorari in this proceeding, petitioner respectfully notes the applicability of that case and suggests the judgment of the United States Courts of Appeals for the Eighth Circuit be vacated and remanded for reconsideration in light of the decision in *Rivet*.

The instant case was instituted in the state court alleging abuse of process. Both the district court and the court of appeals noted that the instant suit is not one for benefits. Respondent on page 3 concedes no ERISA claim was pleaded. The district court was of the opinion that the state claim for abuse of process might allow the trier of fact to possibly consider a defense by respondent that the insurance contract would have a bearing on the insurer's reasonableness, but the district court did not believe petitioner alleged a benefit claim. The court of appeals suggested only "conflict" preemption. *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 439 (8th Cir. 1997).

Since the action pleaded was not one under 29 U.S.C. §1132(a) to recover benefits or clarify rights to future benefits or to secure fiduciary correction,[1] and since it was not an action against any

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[1]Respondent's brief notes a second count for "fiduciary" misconduct, but the relationship there pleaded is not as an ERISA fiduciary which respondent did not plead or allege in *Painter I*. It related to duty imposed by the various states against insurers, demanding they fairly deal with and not engage in bad faith conduct against policyholders. See, e.g., *Holmgren v. State Farm Mut. Automobile Ins. Co.*, 976 F.2d 573, 578 (9th Cir. 1992); *State Farm Fire & Cas. Co. v. Simmons*, 857 S.W.2d 126, 132 (Tex. Ct. App. 1993); *Martin v.*

(Continued)

ERISA primary party, there was no "artful pleading" to avoid raising a benefit claim in the guise of misconduct under state law. Petitioner's claim had no federal character and both courts concluded it should be dismissed with prejudice because ERISA provided no such action. The federal court had no original jurisdiction.

In the ERISA arena many courts have observed similar to this Court's *Rivet* decision, if an action is instituted in state court and there is only conflict preemption, removal to the federal court is inappropriate. *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995) (complete preemption exists only where the claim rests upon the terms of the plan or resolution of the claim requires plan interpretation); *Franklin H. Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2nd Cir. 1995) (removal improper because federal preemption was a defense to plaintiffs' suit and did not

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1/(Continued)

Prier Brass Mfg. Co., 710 S.W.ed 273 (Mo. App. 1989). See generally Richmond, Douglas R., *An Overview of Insurance Bad Faith and Litigation*, 25 Seton Hall Law Review 74 (1994).

While it is true ERISA may impose fiduciary duties even on those in plan administration in collecting information, to the extent respondent ever carried out such duties, missing from all of respondent's pleadings, once that work is done respondent could no longer claim fiduciary status. *Brandt v. Grounds*, 687 F.2d 895, 896-97 (7th Cir. 1982) (bank which became a fiduciary by providing investment advice for a fee was not acting as a fiduciary in honoring a forged signature which permitted a trustee to withdraw money form a bank account as to which the bank was merely a non-fiduciary depositor). Respondent's brief concedes even the denial decision had been made before respondent instituted *Painter I*; respondent sought no helpful judicial guidance in decision making. Neither petitioner nor respondent in either pleadings or brief in either *Painter I* or in the instant case, have proposed respondent could exercise any discretionary authority or had any control over plan management. See, e.g., *Sirna Profit Sharing Plan v. Purdential Securities, Inc.*, 964 F.Supp. 147 (S.D. NY 1997) (firm that became fiduciary with respect to money market fund's management does not thereby become fiduciary for all plan decisions and plan management).

appear on the face of the complaint); *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269 (2nd Cir. 1994) (even if state law claim is preempted by ERISA, removal not authorized); *Pacificare, Inc. v. Burrage*, 59 F.3d 151 (10th Cir. 1995) (removal of medical malpractice claims pled against plan improper); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3rd Cir.), *cert. denied*, 116 S.Ct. 564 (1995) (removal of medical malpractice claims against plan improper) *Zuniga v. Blue Cross*, 52 F.3d 1395 (6th Cir. 1995) (an action not for plan benefits and not arising under 29 U.S.C. §1132(a)(1)(B) is not removable); *Smith v. Texas Children's Hosp.*, 84 F.3d 152 (5th Cir. 1996) (misrepresentation as to plan benefits if plaintiff changed jobs, not removable); *Farr v. US West, Inc.*, 58 F.3d 1361 (9th Cir. 1995) (state law claim for fraud and misrepresentation as to tax aspects of benefits, not pre-empted since claim had nothing to do with the plan itself or the benefits promised under the plan). The Eighth Circuit is in disagreement.

While the questions raised in the petition for writ of certiorari are of the greatest importance to the disadvantaged who must rely on COBRA, HIPAA and state conversion laws to obtain continuation of health insurance, and the suggested disposition by this brief would not have this Court address those questions, yet as a matter of economy in judicial administration it is respectfully submitted the intervening decision in *Rivet* constrains petitioner to ask that the Eighth Circuit be directed to reconsider its decision in light of *Rivet*. The courts below have already ruled no ERISA action had been pleaded by plaintiff by her state court filing.